

1 DATED: 2/24/2023

LAW OFFICES OF MICHAEL P. BALABAN

2
3
4 BY: /s/ Michael P. Balaban

Michael P. Balaban, Esq.

LAW OFFICES OF MICHAEL P. BALABAN

10726 Del Rudini Street

Las Vegas, NV 89141

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
MEMORANDUM OF POINTS AND AUTHORITIES

I.

PRELIMINARY STATEMENT

This is a race-based employment discrimination action. Plaintiff Colvin is black. His legal claims of (1) retaliation, (2) discrimination regarding overtime opportunities, (3) harassment and (4) negligent training and supervision will be heard at trial. He seeks lost wages and compensatory damages for pain and suffering, including humiliation, embarrassment and emotional distress relative to the above legal claims. He also seeks attorney's fees and costs.

Defendant M.J. Dean Construction, Inc. ("Defendant" or "M.J. Dean Construction") seeks to introduce physical evidence, witness testimony and attorney comments relating to termination from past employment.

By this motion, Colvin seeks an order precluding the introduction of any evidence, or mention of evidence, relating to termination from past employment.

This motion is based upon the grounds that the evidence is irrelevant, unfairly prejudicial and clearly inadmissible.

II.

**THIS COURT MAY EXCLUDE EVIDENCE IN ADVANCE OF
TRIAL BY WAY OF AN IN LIMINE MOTION**

The Court has authority to grant a motion in limine, in advance of trial, which excludes inadmissible evidence, as well as any and all reference by the parties, attorneys and witnesses to

1 the inadmissible evidence. *Luce v. U.S.*, 469 U.S. 38, 41 (1984), 16 Fed. R. Evid. Serv. 833
 2 (1984); *U.S. v. Lachman*, 48 F.3d 586, 590-94, 41 Fed. R. Evid. Serv. 339 (1st Cir. 1995).

3 In addition, Federal Rules of Evidence 103(c) and 104(c) allow the court to hear and
 4 determine the question of the admissibility of evidence outside the presence or hearing of the jury.
 5 *Williams v. Board of Regents of University System of Georgia*, 629 F.2d 993, 999-1001 (5th Cir.
 6 1980).

7 **III.**

8 **EVIDENCE OF TERMINATION FROM PAST EMPLOYMENT IS IRRELEVANT AND** 9 **SHOULD THEREFORE BE EXCLUDED FROM INTRODUCTION AT TRIAL**

10 Federal Rule of Evidence 401 provides that “evidence is relevant if (a) it has any tendency
 11 to make a fact more or less probably than it would be without the evidence; and (b) the fact is of
 12 consequence in determining the action.” *Huddleston v. U.S.*, 485 U.S. 681, 682-92, 25 Fed. R.
 13 Evid. Serv. 1 (1988); *U.S. v. Brandon*, 17 F.3d 409, 443-46 (1st Cir. 1994) (rejected on other
 14 grounds by, *U.S. v. Stockheimer*, 157 F.3d 1082 (7th Cir. 1998)). Evidence must be excluded
 15 where it is not relevant to matters at issue. *Arlio v. Lively*, 474 F.3d 46 (2nd Cir. 2007) (evidence
 16 regarding a prior arbitration was irrelevant and should have been excluded); *U.S. v. Edwards*, 631
 17 F.2d 1049, 1051 (2d Cir. 1980) (trial judge had discretion to exclude two witnesses that were
 18 offered by the defendant as irrelevant and collateral.) In fact, Federal Rule of Evidence 402 states
 19 in pertinent part, “Irrelevant evidence is not admissible.”
 20

21 This case is about Plaintiff and his employment with Defendant and before the jury is
 22 whether Colvin was retaliated against for reporting racial harassment, suffered discrimination
 23 because of his race regarding overtime opportunities, was harassed because of his race and
 24 whether M.J. Dean Construction is liable for negligent training and supervision.

25 This being the case, the fact that Colvin was termination from past employment is wholly
 26 irrelevant to the facts and issues to be decided at trial. In fact Plaintiff’s termination is not even at
 27 issue in this lawsuit so how could it be relevant that he was terminated from past employment.
 28

Thus any mention of Colvin being terminated from past employment should be excluded from being introduced at trial.

IV.

EVIDENCE OF PAST LAWSUITS, LEGAL FILINGS AND/OR PROCEEDINGS OF PLAINTIFF UNRELATED TO THIS LAWSUIT SHOULD FURTHER BE EXCLUDED PURSUANT TO FEDERAL RULE OF EVIDENCE 403

Under Federal law, evidence should be excluded when the prejudicial impact of the evidence outweighs the probative value of it. *Old Chief v. U.S.*, 519 U.S. 172, 180-92, 45 Fed. R. Evid. Serv. 835 (1997); *U.S. v. Aguilar-Aranceta*, 58 F.3d 796, 800-02, 42 Fed. R. Evid. Serv. 843 (1st Cir. 1995); *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1343, 59 Fed. R. Evid. Serv. 431 (3rd Cir. 2002).

In fact, Federal Rule of Evidence 403 specifically states, “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasting time, or needless presenting cumulative evidence.”

As set forth above this is an employment case and involves issues of whether Plaintiff was retaliated against, suffered discrimination regarding overtime opportunities, was harassed and whether Defendant is liable for negligent training and supervision. It has absolutely nothing to do with Colvin being terminated from past employment.

Thus allowing the evidence in will unlikely result in unfair prejudice to Plaintiff without advancing even marginally probative evidence. For example the jury could conclude that because Colvin was terminated from past employment that his claims for retaliation, discrimination regarding overtime opportunities, harassment and negligent training and supervision in this case don’t have merit without analyzing the specific facts and law as it relates to the individual claims.

It is also expected that Defendant with try to get into evidence that Plaintiff was terminated for a past job, sued the employer for wrongful discharge and received a substantial settlement.

Allowing presentation of that type of evidence would likely confuse the issues and lead the jury to conclude that Colvin is just suing M.J. Dean Construction to get a settlement or to receive a verdict that he is not entitled to.

This being the case, admitting the evidence will likely lead to juror confusion of the issues and result in unfair prejudice to Plaintiff. As a result of the foregoing, the evidence of Colvin's termination from past employment or lawsuits or settlements related to should be excluded.

V.

CONCLUSION

For all the reasons stated above, Plaintiff requests that this Court exclude any reference at trial, including physical evidence, witness testimony and attorney comments, relating to Plaintiff's termination from past employment or lawsuits or settlements related to should be excluded.

DATED: 2/24/2023

LAW OFFICES OF MICHAEL P. BALABAN

BY: /s/ Michael P. Balaban

Michael P. Balaban, Esq.

LAW OFFICES OF MICHAEL P. BALABAN

10726 Del Rudini Street

Las Vegas, NV 89141

CERTIFICATE OF SERVICE

I hereby certify that pursuant to FRCP Rule 5(b)(3) and LR IC 4-1(a), a true and correct copy of the foregoing document was electronically served via the Court's CM/ECF electronic filing system to the following persons on February 24, 2023:

Martin A. Little, Esq.
Robert L. Rosenthal, Esq.
HOWARD & HOWARD ATTORNEYS PLLC
Attorneys for Defendant

/s/ Michael P. Balaban
Michael P. Balaban